

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DENNIS TOMOSON,

Petitioner,

v.

RICHARD MORGAN, ELDON VAIL,
ANNE ADAMS, MARGE LITRELL,
and ROBERT PIVER,

Respondents.

NO. CV-05-0112-MWL

ORDER ADOPTING REPORT AND
RECOMMENDATION

Magistrate Judge Leavitt filed a Report and Recommendation on January 30, 2007, recommending that Defendants' motion for summary judgment (Ct. Rec. 92) be granted and that Plaintiff's complaint be dismissed with prejudice. (Ct. Rec. 108).

On February 13, 2007, Plaintiff filed objections to the Report and Recommendation. (Ct. Rec. 112). Plaintiff fails to raise specific objections regarding the findings in the Report and Recommendation filed on January 30, 2007. Instead, Plaintiff asserts that Judge Leavitt "has ruled in favor of the defendants every single time in this cause," and "is clearly arguing a case for the defendants." (Ct. Rec. 112). Accordingly, Plaintiff's objection essentially argues that Judge Leavitt is biased in favor of Defendants in this case. (Ct. Rec. 112). There is no such evidence, and no substantive objection is made on the merits of the summary judgment recommendation.

1 28 U.S.C. § 455(a) provides that “[a]ny justice, judge, or
2 magistrate of the United States shall disqualify himself in any
3 proceeding in which his impartiality might reasonably be
4 questioned.” Under section 455, a judge has an affirmative duty
5 to recuse himself “in any proceeding in which his impartiality
6 might reasonably be questioned.” *Liteky v. United States*, 510
7 U.S. 540, 555 (1994) (citation omitted). The substantive standard
8 for recusal under 28 U.S.C. § 455 is “whether a reasonable person
9 with knowledge of all the facts would conclude that the judge’s
10 impartiality might reasonably be questioned.” *United States v.*
11 *Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997); *United States v.*
12 *Studley*, 783 F.2d 934, 939 (9th Cir. 1986). Judicial rulings
13 alone almost never constitute a valid basis for a bias or
14 partiality motion. *Liteky*, 510 U.S. at 555; *Ortiz v. Stewart*, 149
15 F.3d 923, 940 (9th Cir. 1998); *United States v. Bauer*, 84 F.3d
16 1549, 1560 (9th Cir. 1996). Judicial bias or prejudice formed
17 during current or prior proceedings is sufficient for recusal only
18 when the judge’s actions “display a deep-seated favoritism or
19 antagonism that would make fair judgment impossible.” *Liteky*, 510
20 U.S. at 555. Thus, judicial rulings may support a motion for
21 recusal only “in the rarest of circumstances.” *Id.*

22 In this case, Plaintiff essentially argues that Judge
23 Leavitt’s Report and Recommendation should not be adopted because
24 Judge Leavitt has displayed bias in favor of Defendants in this
25 case. (Ct. Rec. 112). Plaintiff’s basis for objecting to a
26 Report and Recommendation to grant Defendants’ motion for summary
27 judgment arises solely from the Judge Leavitt’s orders in this
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1 case.¹ As such, they are not a proper reason for recusal without
2 a showing of "deep-seated and unequivocal antagonism that would
3 render fair judgment impossible." Plaintiff does not allege any
4 extrajudicial source for Judge Leavitt's alleged bias. Nor does
5 Plaintiff demonstrate such a deep-seated favoritism on the part of
6 the Judge Leavitt as to make fair judgment impossible. Thus,
7 Plaintiff's claim that Judge Leavitt has displayed bias in this
8 matter is rejected.

9 A review of the January 30, 2007 report and recommendation
10 reveals that Judge Leavitt carefully reviewed the Defendants'
11 motion and the pleadings submitted by the parties and
12 appropriately found in favor of the Defendants. (Ct. Rec. 108).
13 As noted in the January 30, 2007 Report and Recommendation, the
14 evidence demonstrates that Defendants' action of infracting
15 Plaintiff was not retaliatory. (Ct. Rec. 108, pp. 6-10). The
16 evidence shows that Plaintiff was infracted for his violations of
17 prison policy and not in retaliation for his grievance filing.
18 The infraction of Plaintiff also served the legitimate penological
19 purpose of maintaining institutional safety and security.

20 With regard to Plaintiff's claim that his August 2003
21 transfer from the WSP to the Airway Heights Correctional Center
22 was retaliatory, Plaintiff alleged no facts linking any of the
23 named Defendants to his transfer. Plaintiff additionally failed
24 to allege any facts suggesting that he was retaliated against
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27 ¹Plaintiff asserts that "Judge Leavitt has ruled in favor of
28 the defendants every single time in this cause." (Ct. Rec. 112,
p. 2). Since this is a non-consent case, all substantive motions
in this matter have been reviewed and decided by this judicial
officer.

1 based on his exercise of a protected right or that his First
2 Amendment rights were chilled as a result.

3 Finally, although the Court did not need to address
4 Defendants' arguments that they are entitled to qualified immunity
5 from this lawsuit, the Court additionally notes that the claims
6 against Defendants Morgan, Littrell and Vail are barred under the
7 Eleventh Amendment. Plaintiff alleged no facts demonstrating that
8 Defendants Morgan, Littrell and Vail personally participated in
9 the alleged deprivation of constitutional rights; knew of the
10 violations and failed to act to prevent them; or promulgated or
11 "implemented a policy so deficient that the policy 'itself is a
12 repudiation of constitutional rights' and is 'the moving force of
13 the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642,
14 646 (9th Cir. 1989). Accordingly, Plaintiff's claims under
15 section 1983 against Defendants Morgan, Littrell and Vail are also
16 barred by the Eleventh Amendment.

17 Having reviewed the January 30, 2007 Report and
18 Recommendation (Ct. Rec. 108) and Plaintiff's objections thereto
19 (Ct. Rec. 112), said Report and Recommendation is **ADOPTED** in its
20 entirety.

21 Based on the forgoing, **IT IS HEREBY ORDERED:**

22 1. Defendants' motion for summary judgment (Ct. Rec. 92) is
23 **GRANTED** and Plaintiff's complaint (Ct. Rec. 7) is **DISMISSED, with**
24 **prejudice.**

25 2. Judgment shall be entered for **Defendants.**

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S/ Edward F. Shea
EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE